United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

74-2655 B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, ex rel.
ALFRED LEWIS,

Petitioner-Appellant,

-against-

ROBERT J. HENDERSON, Superintendant
of Auburn Correctional Facility,

Respondent-Appellant.

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DOCKET # 74-2655

PETITION FOR REHEARING WITH
SUGGESTION FOR REHEARING
EN BANC

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ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK DENYING A PETITION FOR A WRIT OF HABEAS CORPUS

PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

TO: THE HONORABLE JUDGES OF THE COURT OF APPEALS:

Appellant Alfred Lewis respectfully petitions this Court for a rehearing, with suggestion for rehearing en banc, of his appeal from an order of the United States District Court for the Northern District of New York [Port, J.], entered on August 20, 1974, denying appellant's petition for a writ of habeas corpus. A panel of this Court [Anderson, Mansfield, Oakes, Js.] affirmed in part, reversed in part and remanded for a hearing in a decision dated June 4, 1975, Slip. Op. 3955.

POINT I

SINCE THE PANEL HELD CONCEDED OR UNCONTESTED THE VERY SAME FACTS WHICH IT ALSO HELD, "IF PROVEN WOULD ESTABLISH THAT LEWIS' CONFESSION WAS OBTAINED IN CIRCUMSTANCES WHICH OVERCAME HIS WILL," A FURTHER EVIDENTIARY HEARING IS SUPERFLUOUS, AND THIS COURT SHOULD ORDER THE WRIT TO ISSUE.

The Panel of this Court found from the record of the two State hearings on the voluntariness of appellant's confessions that certain facts were offered, conceded and uncontested by the State in both of those proceedings :

(1) It is uncontested that not once during his 38 hours of detention by the police, was Lewis ever advised of his right to remain silent or of his right to counsel. In addition, he was at no time allowed to see or speak to anyone but the police, except during the expedition to retrieve the money.

Slip. Op. at 3959

(2) Other aspects of Lewis' story are corroborated or uncontradicted, however. The police witnesses agreed that Lewis was interrogated intermittently at the 30th Precinct throughout the night about the Bronx robbery.

Slip Op. at 3957-58

(3) Upon arrest Lewis was immediately taken to the 30th Precinct headquarters where he was kept overnight until about noon of the next day, February 18. He was not booked on any charges and was not arraigned before a Magistrate on that night or the next morning (and not until 38 hours after his arrest).

Slip. Op. at 3957

(4) None of them (police witnesses) knew whether petitioner had been given any food or allowed to sleep in the short intervals between interrogation sessions... agreed

that the interrogations took place, but did not know whether petitioner had been allowed to eat or sleep (either on February 17-18 at the 30th Precinct or later at the 42nd Precinct).

Slip Op. at 3958.

(5) During the period the police tried to convince Lewis to cooperate by promising to drop criminal charges pending in another jurisdiction, and to accept his claim that the money in the briefcase was gambling winnings if he would agree to lead them to the money... he confessed after further promises of help from the police in the disposition of his case.

Slip Op. at 3958

(6) ...petitioner, then a 22 year old black man with a 9th grade education, was arrested on the (assault) complaint of a Mrs. Elizabeth Waller...

Slip Op. at 3957.

All these facts are documented in the State trial and Huntley hearing testimonies of the police witnesses (See appellant's main brief). In addition, Detective Corbett did testify at the trial that he didn't think appellant had slept during the night of the interrogations (T. 382) and that appellant received no food or water after 1 P.M. on the 18th at the 42nd Precinct (T. 350, 382). He also testified at the 1970 Huntley hearing that he knew that appellant was never advised of his rights or told that he could consult with a lawyer or anyone else (H. 83).

After reviewing the above uncontested **and** conceded facts, the panel went on to say, "we cannot avoid the conclusion that these facts, if proved, would establish that Lewis' confession was obtained in circumstances which overcame his will." Id. at 3965. We submit that if all these facts were conceded and uncontested by the State and corroborated by the State's own witnesses, they have indeed been proved. This court should then

follow its own recitation of the legal implication of the "particular factors or groups of factors (all of which are found in this case by the panel itself) which, when included in the totality of circumstances, require that a resulting confesion be invalidated on grounds of coercion." Slip Op. at 3962. The Panel lists six of these factors with supporting authority, finds all of those factors present in this case, yet refuses to apply the law which it says must be applied and remands for a hearing to find what is already found. Of course, the Courts below ignored these facts but they were always present in the testimony at trial and Huntley hearings. No new hearing is necessary to develop them.

In confessions cases it has always been the self-appointed obligation of the appellate tribunal to review the facts surrounding the taking of the confession to make its own determination of the "totality of the circumstances." And, this Court has specifically held that where the facts are not in dispute, it will make its own determination without needless, time consuming, irrelevant remands for superfluous hearings (which have only the effect of giving the State endless opportunities to supply evidence which has so far been non-existent). United States ex. rel. Lasky v. La Vallee, 472 F. 2d 960 (2d Cir., 1973). In this case, appellant has fought for 18 years for justice and for 18 years he has been rebuffed by the Court system; the State law enforcement authorities and their Courts, having had two opportunities to settle any questions once and for all, failed to do so and were rewarded by Courts which looked the other way and ignored their Constitutional obligations. With the Panel's

decision remanding for yet a third hearing, when the facts are in, this Court perpetuates this avoidance of Constitutional obligation. The State does not deny that appellant was kept in exclusive police custody for 38 hours; the State does not deny that he was never booked for the reason offered for his original arrest; the State does not deny that he was kept away from an arraigning Magistrate until a confession was obtained; the State does not deny that he was given no rights advice or counsel on his own behalf; the State does not deny that he was 22 years old, black, with a 9th grade education; the State does not deny that he was interrogated throughout the night by relays of policemen; the State does not deny that the police made promises; and, finally, the State, who controls all the witnesses to these events, has twice pleaded ignorance as to whether appellant was actually fed during that 38 hours or allowed to sleep at all, let alone for those mysterious 20 minute intervals. What must appellant prove! What court in this country can look at these facts and say the resultant confession was the product of a free will, or that despite these barbaric police practices, the conviction will be permitted to stand!

Furthermore, for the additional reasons that the State offered no witnesses to refute appellant's allegations of physical beatings in the dormitory room, while conceding all the above described factors constituting a designed process of incommunicado detention and psychological will overbearance, the clear intention and predilection of which was to use any and all illegal methods to extract a confession, and because the

Huntley judge relied on the Constitutally improper criterion of appellant's lack of complaint before the arraigning magistrate when he was without an attorney (Arsenault v. Massachusetts, 393 U.S. 5 (1968)), the Panel was incorrect in affirming the denial of the Writ on the physical coercion aspects of appellant's petition (See appellant's reply brief at pp. 5, 708).

CONCLUSION

FOR THE ABOVE STATED REASONS,
THIS APPEAL SHOULD BE REHEARD
BY THIS COURT AND THE WRIT
SHOULD ISSUE RELEASING APPELLANT
FROM STATE CUSTODY.

Respectfully submitted,

LAWRENCE STERN
Attorney for Petitioner/Appellant
11 Monroe Place
Brooklyn, N.Y. 11201
(212) 875-4304

ATTORNEY'S CERTIFICATE

LAWRENCE STERN, attorney for Petitioner/Appellant ALFRED LEWIS, hereby certifies that the within petition is presented in good faith and not for reasons of delay.

Lawrence Stern

LAWRENCE STERN

STATE OF NEW YORK, COUNTY OF New York ss.:

Lawrence Stern being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at 11 Monroe Place, Brooklyn, NY.

Affidavit of Service By Mail — On June 16 1975 deponent served the within Petition for Rehearing upon Attorney General of the State of New York attorney(s) for Appellee in this action, at 2 World Trade Center, N.Y., NY the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in a post office — official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Affidavit of Personal Service — On 19 at deponent served the within upon herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Check Applicable Box

Sworn to before me on June 16 75

STEVEN BERNSTEIN
NOTARY PUBLIC, STATE OF NEW YORK
No. 31-4520522
Qualified in New York County
Term Expires March 30, 1976

Lawrence Stern

The name signed must be printed beneath

Lawrence Stern